Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

TERM: October Term, 1994.

DAVID L. BURR,	)
Petitioner,	)
vs.	)
	)
PAUL L. O'BOYNIK, M.D.;	)
DAVID SCHLOESSER, M.D.;	)
MARTIN E. WEINAND, M.D.;	)
STEVEN J. HESS, M.D.;	)
BOARD OF REGENTS OF THE STATE OF KANSAS;	)
UNIVERSITY OF KANSAS MEDICAL CNTR;	)
KANSAS UNIVERSITY SURGERY ASSN;	)
Respondents.	)

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

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116 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Kansas Supreme Court violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when, in its majority opinion, it ignored the established Standard Rules of Statutory Construction; disregarded the clear and unambiguous language of Kansas Statute 60-206(b); and rendered an arbitrary decision, that was inconsistent with previous Kansas Supreme Court holdings, and that partially voided the effect of K.S.A. 60-206(b) in Read v. Miller, 247 Kan 557; 802 P.2d. 528, which is a precedent in this case? [i.e. Does a state court have the authority to arbitrarily disregard the established Standard Rules of Statutory Construction, etc.]

2. Did the Kansas Supreme Court deny petitioner/appellant procedural due process, as guaranteed by the Fourteenth

Amendment to the U.S. Constitution when, through its precedent ruling in Read v. Miller, it compelled the State District Court to feel obligated to ignore the established Rules of Statutory Construction; to adopt and apply an arbitrary rationale, that included and was derived from judicial procedure, inadequate to the point of being contrary to the requirements of procedural due process; and to accordingly dismiss petitioner's case, contrary to clear legislative intent and statutory law as it otherwise would have been applied?

3. Did the Kansas State District Court of Wyandotte County deny petitioner/plaintiff procedural due process, as guaranteed by the Fourteenth Amendment to the U.S. Constitution when it ignored the established rules of statutory construction; adopted and applied an arbitrary rationale, that

included and was derived from judicial procedure, inadequate to the point of being contrary to the requirements of procedural due process; and consequently dismissed petitioner's case, according to erroneous interpretations of statutory requirements, and issuance of a 'finding of fact' prohibited by law as defined by the Kansas Supreme Court.

4. Did the Kansas State District Court of Wyandotte County violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when it imposed an unnecessary and overly burdensome procedural requirement on petitioner, *in the knowledge* that this act represented an obstacle that would be likely to prevent petitioner from accomplishing a timely service of process, and could thereby directly cause and result in the termination of petitioner's right to legal recourse.

5. Did the Kansas State District Court of Wyandotte County violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when it permitted the introduction of an 'unserved' pivotal amendment [Read v. Miller precedent] to defendants' 'Motion to Dismiss' in petitioner's absence, and based immediate dismissal upon that issue without notifying petitioner of new issue, or allowing petitioner a reasonable opportunity to respond?

6. Did the Kansas Court of Appeals deny petitioner/appellant procedural due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution when it refused to consider the preceding issues, properly raised before it; when it ruled a lack of jurisdiction, even though the Read v. Miller decision originated in that Court and was merely 'adopted' by the Kansas

Supreme Court; and when it affirmed the District Court's decision, which embodied a misconstruction of the term 'on or after' to mean 'by this date', and including a 'finding of fact' prohibited by law as defined by the Kansas Supreme Court?

7. Did the Kansas Court of Appeals deny petitioner/appellant procedural due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution when it failed to elevate petitioner's appeal to the Kansas Supreme Court, consistent with its finding of Kansas Supreme Court jurisdiction, and per Kansas Supreme Court Rule 8.01 and Kansas Statute K.S.A.20-3016(a); and ruled against the petitioner, effectively terminating petitioner/appellant's action, with full knowledge that petitioner's properly briefed questions had never been heard by any court?

8. Is K.S.A.60-513(c), necessarily, a violation of the equal protection clauses of Sections 1 and 5 of the Kansas Bill of Rights and/or the equal protection clause of the Fourteenth Amendment to the United States Constitution, given the Kansas Supreme Court's definition of the requirements of 'equal protection', in its relatively recent declarations of the unconstitutionality of K.S.A.60-3403, in Farley v. Engelken, 241 Kan 663; 740 P.2d. 1058 (1987); and of the unconstitutionality of K.S.A.60-3407, 60-3409, and 60-3411 in Kansas Malpractice Victims Coalition v. Bell, 243 Kan 333; 757 P.2d. 251 (1988)?

9. Did the Kansas Supreme Court violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when it unlawfully disregarded its obligation to grant a review of the Kansas Court of Appeals Decision in this case,

when such review was statutorily guaranteed "as a matter of right" pursuant to K.S.A. 60-2101(b)?

10. Did the Kansas Supreme Court violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when it failed to follow its own standards defining its duties; or when it failed to perform its duties as required by the Kansas and United States Constitutions?

11. Did the Kansas Supreme Court violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when it terminated petitioner/appellant's action [through denial of appellant's Petition for Review], in that its knowledge, of the fact that due process had not been afforded at any previous stage of the proceedings, imposed a duty upon it, as the 'ensurer of due process' within the

state; and that this termination violated that sacred and inescapable duty?

12. Did the Government of the State of Kansas, through its Legislative and Judicial branches, violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when it enacted, implemented and sustained a judicial system, which permits legal actions to be terminated, in spite of the fact that legitimate and relevant questions, properly raised, may be ignored and left unresolved, and which permits the Kansas Supreme Court to disregard its statutory obligations, as well as a consistent adherence to its own rules?

13. Did the Kansas Supreme Court violate the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when in the face of reasonable

justification for review, the Court denied petitioner/appellant's petition without rendering any explanation as to why?

LIST OF ADDITIONAL PARTIES

1). Kathleen Kay Burr, petitioner's wife, and co-petitioner in original complaint.

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REPORTS OF OPINIONS

1. ORDER OF DISMISSAL OF ALL DEFENDANTS WITH PREJUDICE, May 26,1994; District Court of Wyandotte County, Kansas.
2. MEMORANDUM OPINION No.72,461, April 7,1995 (Not designated for Publication), Court of Appeals of the State of Kansas.

JURISDICTION

Petitioner, David L. Burr, respectfully prays that a Writ of Certiorari issue to review the decisions of the Kansas State District Court of Wyandotte County, The Kansas Court of Appeals, and the Kansas Supreme Court, in as much as the final decisions in each of those courts, separately and in conjunction, embodied acts, in violation of the Fourteenth Amendment to the United States Constitution and Sections 1, 5, and 18 of the Kansas Bill of Rights.

Furthermore, petitioner prays the court to find affirmatively in the questions presented by petitioner, and to accordingly provide relief by reversing the Kansas Appellate Courts and remanding petitioner's case back to the District Court with instructions, or at least to reverse the Kansas Appellate Courts and remand petitioner's case, with instructions, back to the appropriate level within the Kansas Appellate Courts

The Kansas Supreme Court's denial of Appellant's Petition for Review was issued on June 13, 1995. This Court's jurisdiction is invoked under Title 28, Section 1257 of the United States Code.

Reasons for granting petition:

1). Petitioner has been subjected to a systematic and complete denial of due process.

2). Liberty and Property Interests have been invaded via state action.

3). Government legitimacy has been asserted as justification for invasion.

4). Purported justification for invasions are plausibly disputed.

5). Multiple Kansas court holdings are in conflict with prior U.S. Supreme Court decisions.

6). Multiple current Kansas court holdings are in conflict with other Kansas Supreme Court holdings.

7). Appearance that Kansas Appellate Courts abandoned statutory requirements, and constitutional requirements raises 'Special and Important' questions regarding the latitude and responsibilities of State Courts.

8). Questions arise regarding the weight that should be given to the Rules of Statutory Construction, that are of continuing importance.

9). The Kansas Court System has, in this instance, "so far departed from the accepted and usual course of judicial proceed-

ings as to call for an exercise of the U.S. Supreme Court's power of supervision."

10). Petitioner's allegations of due process violations *should be accepted as true*, given that the Kansas Supreme Court "dismissed petition without hearing, and issued no opinion", Reynolds v. Cochran, Fla. 1961; 81 S.Ct. 723; 365 U.S. 525.

Jurisdiction on Question Presented #8, which might be challenged, is preserved in that it meets an exception to 'late issue' rule established in Puritan-Bennett Corp. v. Richter, 235 Kan 251. Its 'relevancy' did not arise until the Court of Appeals decision, thus it was not required to be previously briefed.

11). K.S.A.60-513(c) is a standing statutory and judicial contradiction, in that due to recent findings by the Kansas Supreme Court, which held related statutes unconstitutional, this statute must also fail.

Granting of Review is suggested in this case, by the Court's opinion that...

"an asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case", Betts v. Brady, 1942, 62 S.Ct. 1252, 316 U.S. 455

...since it seems unlikely that such an appraisal could be made, short of a U.S. Supreme Court review.

*Footnote 1:Additional Case Support see Appendix "C".

CONSTITUTIONAL PROVISIONS AND STATUTES

UNITED STATES CONSTITUTION, AMENDMENT 14: Set forth in Appendix B.

KANSAS BILL OF RIGHTS, Sections 1, 5, and 18. Set forth in Appendix B.

U.S. CODE:
Title 28, Section 1257, set forth in Appendix B.

KANSAS SUPREME COURT RULES:
Rule 8.01, set forth in Appendix B.

KANSAS STATUTES ANNOTATED: (set forth in Appendix B.)

K.S.A.20-3016(a). Transfer to State Supreme Court.

K.S.A.20-3018(b). Conditions for review of case by State Supreme Court.

K.S.A.60-203. Commencement of action.

K.S.A.60-206. Time, computation and extension.

K.S.A.60-513. Actions limited to two

years.

K.S.A.60-2101(b). Supreme Court review as a matter of right.

K.S.A.60-3403. Abrogation of collateral source rule.

K.S.A.60-3407. Limit on compensatory damages.

K.S.A.60-3409/K.S.A.60-3411. Limit on compensatory damages.

STATEMENT OF CASE

On February 6, 1990 the petitioner submitted to a brain surgery procedure to be performed by Dr. O'Boynik at the University of Kansas Medical Center, whereupon petitioner was inflicted with grievous injuries including blindness and other permanently debilitating, painful, and life-threatening medical conditions.

Petitioner filed suit in Wyandotte County District Court on January 19, 1993. After abandoning hope of discovering any evidence of malpractice, petitioner voluntarily dismissed suit on April 19, 1993.

Petitioner refiled suit in Wyandotte County District Court on February 7, 1994. Petitioner made arrangements to serve the defendants, but due to circumstances beyond petitioner's control service did not occur as arranged.

Petitioner discovered this failure on May 9, 1994, or on the final day of the 90-day period [prescribed by K.S.A.60-203(a)]. At 4 PM, when petitioner's representative arrived to receive service papers, the Clerk's office refused to release the paper work to him, notifying him for the first time that his appointment as a Kansas Special Process Server was not valid in Wyandotte County, but instead required him to execute a fresh appointment in Wyandotte County ['In the Matter of the Appointment of Charles Merritt as Special Process Server', filed May 9, 1994]. By the time this was completed and approved it was past 5 PM, and it became impossible for the service of process to be made. Service of

process was completed the following day, May 10, 1994.

Petitioner immediately drafted a 'Motion for Extension or Enlargement of the 90-day Period', which was filed on May 16, 1994, pursuant to K.S.A.60-203(a) and 60-206(b), and which met the requirements for granting of the enlargement and/or extension. Later that same day petitioner received service on defendants' 'Joint Motion to Dismiss', along with defendants' 'Suggestions in Support of Defendants' Joint Motion to Dismiss', both filed May 13, 1994, and which argued that petitioner's claim was time barred under the statutes of limitation, but which made no mention of any alleged ineligibility of petitioner's 'Motion for Extension and/or Enlargement'.

In response, on May 19, 1994, petitioner filed 'Suggestions in Contest of Defendants Motion to Dismiss', which clearly pointed out that defendants' motion was based solely on a deliberate misrepresent-

ation [falsely alleging petitioner's acknowledgment of legal injury by a specific date] of a statement contained within petitioner's petition, and which clearly and unmistakably established that petitioner was disputing the defendants' assertion of when 'cause of action' accrued, and with that, clearly established that defendants' Motion was without grounds as a matter of law.

Because of petitioner's physical handicap, resulting from defendants' inflicted injuries, and petitioner's distance from the District Court [100 miles +], petitioner requested that he be excused from the requirement to attend the hearing on the defendants' motion, scheduled for May 26, 1994, and requested only that he be allowed an opportunity to respond to any new issues that arise. This was filed via petitioner's 'Motion for Ex Parte Hearings on Pretrial Motions or Two Weeks Continuance', filed May 23, 1994. When the court did not

respond, petitioner entered his appearance for the motion hearing via his 'Request for Additional Time', filed on May 25, 1994.

In spite of the court's awareness of the impending pertinence for Petitioner's motions, his 'Motion for Ex Parte Hearings' was ignored and docketed for mid-June 1994 (and then later dismissed as moot), and the 'Request for Additional Time' was never docketed. Other than the first 'Motion for Enlargement', no reference is made to any of petitioner's filings within the District Court's Order of Dismissal, and no court responses were ever received.

District Court's 'Order of Dismissal' was executed May 26, 1994, but not filed until June 29, 1994. This Order, authored by defendants' council, and filed more than a month after the entering of judgment, included a new argument never before conveyed to petitioner in any manner [the Read v. Miller, 247 Kan 557; 802 P.2d. 528; precedent, wherein the Kansas Supreme Court

had ruled that due to a finding of statutory conflict between K.S.A.60-203(a) and K.S.A.60-206(b), 'enlargements' under K.S.A.60-206(b) were not applicable to K.S.A.60-203(a), and 'extensions' under K.S.A.60-203(a) must be sought and granted prior to expiration of the original period prescribed]; and which petitioner had never had an opportunity to respond to. The Dismissal found that the 2-year Statute of Limitations had expired, which by definition, necessitated a finding of fact as to when 'cause of action' had accrued; even though it was not readily determinable as a matter of law; and even though it was in good faith disputed.

Petitioner filed a 'Motion to Amend or Make Additional Findings of Fact' on June 2, 1994, and which the District Court ignored. 'Notice of Appeal' was filed in the District Court on July 28, 1994.

Petitioner argued, clearly, before the Kansas Court of Appeals that the District

Court's decision 'necessitated a finding of fact, which was in good faith disputed', and that according to several rulings of the Kansas Supreme Court, this was improper. Furthermore, petitioner argued before the Kansas Court of Appeals that the rationale applied in Read v. Miller, 247 Kan 557; 802 P.2d. 528, was contrary to the established Rules of Statutory Construction, was in conflict with obvious legislative intent, was inappropriately arbitrary in its application; and that the District Court's extension of this logic to petitioner's case represented a repeat of this due process violation. Finally, petitioner argued before the Kansas Court of Appeals that a number of actions on the part of the District Court represented 'abuses of discretion' and denials of 'due process', including the unnecessary barrier created by the District Court, resulting in the

prevention of petitioner from effecting original service of process; when it ignored virtually all of petitioner's motions; and when it permitted respondents to introduce a new argument and precedent without permitting petitioner any opportunity to respond.

Petitioner's arguments not withstanding, the Kansas Court of Appeals issued it's Memorandum Opinion on April 7, 1995, which also disregarded all of petitioner's points, including the unlawful 'finding of fact' by the District Court [actually repeating the same error], and essentially made a 'non-decision', by addressing only one issue [the question on the validity of the Read v. Miller decision], and ruling that it didn't have the jurisdiction to question that issue.

Consequently, every question raised, was left effectively unaddressed. At the same time, the Court of Appeals raised a new issue, not previously included as a rele-

vant part of the case, in a mention of the four-year statute of limitations.

Petitioner petitioned the Kansas Supreme Court for a 'Review of the Court of Appeals Decision', filed May 3, 1995. Petition Clearly established the statutory 'Right to Review', and clearly pointed out how all of the arguments, previously raised in the appeal indicated violations of Sections 1 and 18 of the Kansas Bill of Rights, as well as the Fifth and Fourteenth Amendments to the United States Constitution. It also pointed out that actions by the Court of Appeals constituted additional denials of 'due process'.

Following "Appellees' Response", petitioner filed a 'Reply to Appellee's Joint Response to Appellant's Petition for Review' on June 5, 1995, which clearly pointed out that defendants did not even address the question of 'grounds for review', much less impeach them. Never-the-less, petition was denied on June

13, 1995. Petitioner then filed a Motion for Reconsideration with the Kansas Supreme Court on June 25, 1995, which reiterated the statutory "Right to Review" which petitioner was rightfully claiming and argued that the Kansas Appellate Courts had a Constitutional duty to hear such cases, but to no avail, as it was also denied on June 27, 1995.

DIRECT ARGUMENT by Question Presented.

a). **General.** The majority of the allegations of denial of due process relate to actions by the courts of Kansas. The Fourteenth Amendment is properly invoked, as the courts are bound, as much as any other governmental body (if not more so), to respect the requirements of due process.

"Judicial action in private disputes is a form of state action required for application of this clause prohibiting state from abridging the privileges and immunities of citizens", Hosey v. Club Van Cortlandt, 299 F.Supp. 501.

"The right to due process of law constitutes 'privilege' and 'immunity' secured and protected by this amendment", U.S. v. Sutherland, 37 F.Supp. 344.

"A final judgment of a state court construing a state statute so as to make it, although apparently innocuous, actually an interference with property rights is an act of the state", Huntington v. New York, CCNY 1902, affirmed 24 S.Ct. 505; 193 U.S. 441.

"State courts bear equal responsibility with federal courts to guard and protect rights secured under the Constitution of the United States", Horn v. O'Cheskey, 378 F.Supp. 1280.

"It is always the duty of trial courts and reviewing courts to see that fundamental rights of due process are not denied in any type of action", City of Mitchel v. Graves, Ind.App.1 Dist 1993, 612 N.E.2d 149.

As an assertion of a prima facia claim that the Kansas Courts denied petitioner due process, petitioner will substantiate that (1) at minimum, a property interest has been invaded by the Kansas State Court System (government) without any opportunity to challenge that invasion, and (2) that the purported justification for the invasion is at least plausibly disputed.

"Within the clause 'property' is more than a mere thing which a person owns and includes the right to acquire", Buchanan v. Warley, 1917, 38 S.Ct. 16; 245 U.S. 60.

"Where injury has occurred for which injured party has a cause of action, such cause of action is vested property right, which is protected by guarantee of due

process", Johnson v. Fournet, La.App. 1980, 387 So.2d 1336.

"A chose in action is a form of property within due process protection", Bush v. Reid, Alaska 1973, 516 P.2d. 1215.

The injury inflicted upon petitioner by respondents gives rise to a 'cause of action' right, and therefore a property right. When the Kansas Courts dismissed (and affirmed that dismissal) they effectively deprived petitioner of that property right (constituting an invasion), and when every subsequent court refused to 'hear' petitioner's appeal, he was effectively denied any opportunity to challenge that invasion. This meets the first requirement for a prima facia claim.

It could reasonably be argued that petitioner's 'liberty' rights have been invaded, as well, establishing that denial of due process is 'substantive'.

"'Liberty' safeguarded by this clause is liberty in a social organization which requires the protection of law against the evils which menace the **health**... and welfare of the people", West Coast Hotel Co.

v. Parrish, Wash. 1937, 57 S.Ct. 578; 300 U.S. 379.

"...liberty... means... to be free in the enjoyment of all his faculties", Allgeyer v. Louisiana, La. 1987, 17 S.Ct. 427; 165 U.S. 589.

"...Liberty... denotes... right... to engage in any of the common occupations of life... and... the... pursuit of happiness", State v. Williams, 1960, 117 S.E.2d. 444.

"... Liberty... encompasses right to pursue benefits and entitlements", Bannum, Inc. v. Town of Ashland, C.A.4 Va 1990, 922 F.2d. 197.

Petitioner's 'Liberty' rights were invaded when Dr. O'Boynik injured him during surgery. As he was blinded and inflicted with numerous other debilitating injuries, its clear that his 'liberty' was deprived. The act giving rise to the injury does constitute an act by a state, in as much as one of the respondents, University of Kansas Medical Center, is a state funded agency, and in as much as the primary respondent, Dr. O'Boynik, is effectively an agent of that hospital.

"Hospital... financed by public funds was sufficiently linked to state" to establish injurious act as an act of the 'state', Meredith v. Allen County War

Memorial Hospital Commission, C.A.Ky. 1968, 397 F.2d.33.

The determination of whether an act constitutes an act of a state depends upon

"... whether state has so far insinuated itself into position of interdependence with private party that it must be recognized as a joint participant in challenged activity", Hollenbaugh v. Carnegie Free Library of Connellsville, PA, C.A.Pa. 1976, 545 F.2d. 382.

When the Kansas Court System denied petitioner's claim, it not only denied him an opportunity to challenge the invasion of his property rights, which came from the deprivation of his cause of action, but it also denied him an opportunity to challenge the invasion of his 'liberty' rights through that action. Again, the requirements of the first element for a *prima facia* claim of 'substantive' denial of due process is met.

Because the state courts held that the denial of petitioner's claim was according to Kansas State Law, and because petitioner

submits a plausible challenge to that holding, the requirements for the second element of a prima facia claim of denial of due process are met.

b). **Question #1**. "Failure of an administrative agency to follow its own established procedures constitutes a violation of procedural due process", Berends v. Butz, D.C.Minn.1973, 357 F.Supp. 143.

It would seem that the reason for this is the principle that "consistency in application" is a fundamental element of "fairness" and a prerequisite to any claim to "equity in administration", which must be a fundamental requirement for "due process".

"Fair play is the essence of due process", Galvan v. Press, Cal 1954, 74 S.Ct. 737; 347 U.S. 522.

"Denial of due process is failure to observe that fundamental fairness essential to the very concept of justice", Linden v. Dickson, C.A. Cal. 1961, 287 F.2d. 55.

Surely if this principle holds true for an administrative body performing a judicial function, it must also hold true for judicial bodies performing judicial functions. Ndt to say that judicial bodies

cannot alter certain procedures and guidelines, as required to establish new standards, but a failure to follow established "fundamental" procedures (or those essential to an equitable administration of justice), particularly when those fundamental procedural standards are recognized as standard requirements nation-wide, and particularly without any explanation or clearly conveyed policy change intent, gives every indication of an arbitrary, inconsistent, and undisciplined act, and must be considered to represent precisely the kind of principle violation described.

This should be considered even more true if the disregarded procedure is one that the judicial body, by its own admission, has a duty to follow. If there is no *compelling rationale* for abandoning such a standard procedural duty, then it must be concluded that the requirements of procedural due process have been violated. If a

claimed rationale is so erroneous that it reduces such rationale to the level of being arbitrary, then it not only fails to meet required due process, but it also substitutes arbitrariness for due process, and this is without question overwhelmingly repugnant to the United States Constitution. Black's Law Dictionary defines 'procedural due process' as being:

the aspect "in which a person is guaranteed fair procedures",

and Webster's defines 'procedure' as,

"a series of steps followed in a regular order."

Therefore, the series of steps followed during the process of arriving at a judicial conclusion constitutes a 'procedure', in that the process includes a series of steps that are the considerations required by law and legal standard. If a court ignores the considerations required by law or legal standard, or acts contrary to them, without meaningful justification, it

is deviating from 'equity in administration', and is contrary to the 'guarantee of fair procedures' represented by the Fourteenth Amendment to the U.S. Constitution.

In Read v. Miller, 247 Kan 557; 802 P.2d. 528, the Kansas Supreme Court disregarded the established fundamental elements of judicial procedure, which are represented by the Standard Rules of Statutory Construction, and in so doing contradicted important principles of law and its own previous holdings.

"It has been held that exceptions are not to be implied. Where there is an express exception, it comprises the only limitation on the operation of the statute and no other exceptions will be implied. An enumeration of exceptions from the operation of a statute indicates that it should apply to all cases not specifically enumerated", Sutherlands Statutory Construction, section 47.11.

This is recognized by the Kansas Court

In Re Olander, 213 Kan 285, "One of the more common rules of statutory interpretation is that expressed in the Latin maxim *'expressio unius est exclusio alterius'*, i.e., the mention or inclusion of one thing implies the exclusion of another." ALSO,

"An exception in a statute which restricts the general enacting clause should

be strictly construed so as to exclude only those cases which are fairly within the terms of the exception", Matter of Marriage of Walie, 19 Kan App.2d 7; 877 P.2d. 809.

Furthermore, the Kansas Supreme Court has acknowledged that statutes which specifically enumerate exceptions, are to be treated as being 'clear and unambiguous'.

When "the legislature specifically enumerated 3 proceedings in which... exception... is applicable... statute is clear and unambiguous", Matter of Mary J, 237 Kan 456; 701 P.2d. 681 (1985).

The Kansas Supreme Court has clearly established its duty in such matters,

...in State v. Schlein, 253, Kan 205; 854 P.2d. 296. "When a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus there is no room for statutory construction."

Therefore, K.S.A.60-206(b), which is a general enactment containing specifically enumerated exceptions, is by legal definition, 'clear and unambiguous'; and therefore the court has a duty to give effect to that legislative intent, and to abstain

from extraneous statutory construction which negates that express legislative intent. For the court to act otherwise, would exceed its judicial authority as allowed by the Kansas and U.S. Constitutions, in accordance with the Separation of Powers doctrine.

"A presumption exists that the legislature understood the meaning of the words it used and intended to use them", Dillons Food Stores, Inc. v. Brosseau, 17 Kan App.2d. 657; 842 P.2d. 319.

"The court must presume the legislature understood and intended the consequences of the words it used", Boatright v. Kansas Racing Commission, 251 Kan 240; 834 P2d. 368.

Given the above cites, for the Kansas Supreme Court to disregard [in its findings in Read v. Miller] the statutory exceptions specifically enumerated in K.S.A.60-206(b), and to construe that K.S.A.60-203(a) was also an exception, is contrary to all accepted procedures, and the established philosophy of the Kansas Judicial System, itself. To so construe, without compelling reason, surely must be viewed as an arbi-

trary act, in conflict with the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution.

Even if it were true that a 'statutory conflict' exists between K.S.A.60-203(a) and K.S.A.60-206(b), K.S.A.60-206(b) should prevail, as it is clear that the legislature intended K.S.A.60-206(b) to be controlling.

"In each case we noted the well established rule that when there is a conflict between a statute dealing generally with a subject and another statute dealing specifically... the specific statute controls **unless** the legislature intended to make the general act controlling", State v. Reed, 254 Kan 52; 865 P.2d. 191.

It is clear in K.S.A.60-206(b) from "**(b) Enlargement. When by this chapter...**" that the legislature intended for this statute to apply to the entirety of chapter 60, which includes K.S.A.60-203(a). A statute, which expressly includes an entire chapter and expressly enumerates those exception statutes within that chapter, must be taken

to represent the legislative intent that, the statute be 'controlling' over that chapter, or else no statutes could ever be considered 'controlling'. Therefore, K.S.A.60-206(b) must be construed to apply to K.S.A.60-203(a), and for the court to disavow this truth, is for it to exceed its judicial authority, and constitutes a denial of due process.

Even if this were not true, and K.S.A. 60-206(b) were not 'controlling', for the court to disregard the established Rules of Statutory Construction, and to invalidate K.S.A.60-206(b) with regards to K.S.A.60-203(a), would require compelling rationale.

"It is a cardinal rule of statutory construction that all statutes are to be so construed as to sustain them; to give them operation if the language will permit; instead of treating them as meaningless", Martindale v. Tenny, 250 Kan 621.

Within the majority opinion of Read v. Miller, 247 Kan 557; 802 P.2d. 528, there was some protracted discussion, which attempted to establish the fact of statutory

conflict, but it was wholly erroneous and utterly failed, largely because the court failed to consider what the Rule of Statutory Construction should be for determining whether or not a statutory conflict does in fact exist.

"It is assumed that whenever the legislature enacts a provision it has in mind previous statutes relating to the same subject matter. In the absence of any express repeal or amendment, the provision is presumed in accord with the legislative policy embodied in those prior statues. Thus, they should all be construed together." "Provisions in one act..."

[i.e. the definition in K.S.A.60-206(b) of *when* an enlargement can be applied for]

"...which are omitted in another on the same subject matter..."

[i.e. K.S.A.60-203(a) does not address *when* an extension can be applied for]

"...will be applied when the purposes of the two acts are consistent. Prior statutes relating to the same subject matter are compared with the new provision; if it is possible by reasonable construction, both are construed so that effect is given to ***every*** provision in all of them... Statutes for the same subject, although in apparent conflict, are construed to be in harmony if reasonably possible... It has been said that 'the need for uniformity becomes more imperative where the same word

or term is used in different statutory sections that are similar in purpose and content... The same rule has been applied even where the language is only substantially similar." Sutherlands Rules of Statutory Construction, section 51.02.

['extend' and 'enlarge', as synonyms, are 'substantially similar']-

*Footnote 2:Additional Case Support see Appendix "C".

It is possible and very reasonable to construe that since K.S.A.60-203(a) does not address *when* an extension may be applied for, the legislature, being aware of the general and controlling effect of K.S.A.60-206(b), felt it unnecessary to repeat that provision and were content to allow K.S.A.60-206(b) to be supplementary and complementary to K.S.A.60-203(a) in supplying that provision. In this reasonable interpretation, the two statutes are harmonious and both in full effect. Given the aforementioned Rules of Statutory Construction, the Kansas Supreme Court had a duty to prefer this interpretation over one that partially nullified K.S.A.60-

206(b), particularly if based upon arbitrary or erroneous rationale. Failure in this duty by the Kansas Supreme Court constitutes a violation of procedural due process, as provide for by the Fourteenth Amendment to the U.S. Constitution.

This argument is further augmented by,

"A final qualification on the doctrine is that the general words are not restricted in meaning to objects of the same kind *(ejusdem generis)*... If, upon a consideration of the context and the objects sought to be attained and of the act as a whole, it adequately appears that the general words were not used in the restricted sense suggested by the rule, we must give effect to the conclusion afforded by the wider view in order that the will of the Legislature shall not fail... The indication that the general words have their full and natural meaning, regardless of their connection with a series of specific words, may be found in the context of the statute as a whole, by consideration of its purpose." Sutherlands Rules of Statutory Construction, section 47.22.

The point is that, by every indication, the intent of the legislature was that the general meaning and purpose of the term 'enlarge', as applied in K.S.A.60-206(b), was to provide for 'extensions of statu-

torily defined periods of time'. There is absolutely no indication that the legislature intended that this term be applied in any 'restricted' sense. There is no indication that the legislature considered the term 'enlargement' to indicate something uniquely different than an 'extension', as used in K.S.A.60-203(a).

The two terms are making reference to the same '*thing or class of things*'. Therefore the wider view, which gives the term 'enlarge' its full and natural meaning, would provide that K.S.A.60-206(b) is addressing the same *things* that are addressed in K.S.A.60-203(a), and since only K.S.A.60-206(b) provides instruction on when these *things* may be applied for, there is no conflict. Since this interpretation allows for harmony between the statutes and gives every indication of being consistent with the will of the Legislature, and as there is not the slightest

indication to the contrary, this interpretation must be given effect so that the will of the Legislature shall not fail.

It is fairly clear that this interpretation in alignment with the principles and rules of statutory construction; and that the Kansas Supreme Court erred in this respect. This truth was clearly briefed before the Kansas Court of Appeals, which however declined to make an assessment.

Instead of relying on the Rules of Statutory Construction, the erroneous rationale of the Kansas Court of Appeals relied on <u>three</u> invalid points:

1). An assertion that the term 'extension' (used in K.S.A.60-203(a)) grammatically, and by Webster's definition, precluded retroactive application. [This assertion was absolutely and wholly without factual basis. In fact, it is contrary to the common usage of the term 'retroactive extension'.]

2). An inference that 'extension', referred to in K.S.A.60-203(a), has a different meaning than 'enlargement', referred to in K.S.A.60-206(b), and should be regarded as having different eligibilities, with regard to retroactive application. [Even though the court defines the two terms as being synonymous, constituting an internal contradiction and fatal flaw in the rationale.]

"To extend means to stretch out... or enlarge a thing", Read v. Miller, 247 Kan 557; 802 P.2d. 528.

3). Tennessee and Missouri opinions, which denied retroactive 'extensions', but which would also have disallowed retroactive 'enlargements', constituting a position directly opposed to the intent expressed by the Kansas legislature in K.S.A.60-206(b); which means that the opinions of those states do not correlate with Kansas Law and are therefore irrelevant.

When it is recognized that all three of these assertions fail to provide any rele-

vant bearing on the issue in question, it can also be recognized that there is no rational basis, whatsoever, for declaring that a statutory conflict exists, and so there is no rational justification [and certainly no compelling reason] for partial invalidation of the effect of K.S.A.60-206(b). Further analysis reveals that, in fact, a conflict does not exist between the two statutes, as the **scopes** are not in conflict. This is covered in more detail in Appellant's Brief, but in short, the question of "when an extension may be applied for is not addressed, whatsoever, within the text of K.S.A.60-203(a), so there is no way that a conflict is created when that question is answered within the text of the more general (and intentionally controlling) statute, K.S.A.60-206(b). In fact, K.S.A.60-206(b) *supplements* K.S.A.60-203(a) and is *complementary* to it. This conclusion is supported by the opinion of the

dissenting Justices in Read v. Miller. In this case the majority opinion is mistaken and the minority opinion was correct. This should be rectified as it creates an institutionalized denial of a reasonable access to due process.

"Identification of specific dictates of due process generally requires consideration of three distinct factors: Private interest that will be affected by official action; Risk of erroneous deprivation of such interest through procedures used; and probable value, if any, of additional or substitute procedural safeguards; and government's interest, including involved fiscal and administrative burdens that additional or substituted procedural requirements would entail", Matthews v. Eldridge, Va.1976, 96 S.Ct. 893; 424 U.S. 319.

Following this logic, a) there is a significant private interest that is affected by this ruling; b) the arbitrary nature of this decision methodology virtually guarantees inconsistent and erroneous results, yielding that the risk of erroneous deprivation of life, liberty and property, inherent in 'randomness', are unacceptably high, in any case where a

question of possible statutory conflict arises; c) the probable value of requiring a more substantial test of compatibility [as a procedural safeguard] before judicial decrees are issued [that statutory conflict exists], is that statutes will be far less likely to be declared invalid; and consistency and equity in the administration of justice is enhanced; and d) additional burdens created by this safeguard [other than the requirement for a slightly more disciplined judicial approach] are virtually non-existent.

In the face of Statutory Construction Rules and without any reasonable basis, much less a compelling reason, to invalidate the effect of K.S.A.60-206(b), the opinion of the Kansas Supreme Court majority in Read v. Miller, 247 Kan 557; 802 P.2d. 528, constitutes an *arbitrary* ruling, and an error.

State Supreme Courts ARE the authorities for interpretting State Legislative intent, and a judicial error, in and of itself, does not constitute a denial of due process, **but** when that interpretational error amounts to the imposition of arbitrariness over due process; or when that error translates into the lack of justification for departing from established judicial rules; the State Court has gone beyond interpretting a state law, it has infringed upon Federal protection against arbitrary government and guarantees of due process; and this does warrant intervention.

"The requirements of due process "are intended, in addition to other guarantees of private rights, to give increased security against the **arbitrary** deprivation of life or liberty, and the **arbitrary** spoliation of property", Missouri Pacific R.R. Co. v. Humes, Mo 1885, 6 S.Ct. 110; 115 U.S. 512.

"Protection of individuals against arbitrary government action is the great purpose of this clause", Wilwording v. Swenson, C.A.Mo. 1974, 502 F.2d. 844.

"Due process clause of Fifth Amendment is a limitation on **arbitrary** authority...", Fela v. U.S. Merit Systems Protection Bd., N.D., Ohio 1989, 730 F.Supp. 779. [Must also apply to Fourteenth Amendment].

"Statutes or other exertions of governmental power that lack rational basis... are held to violate due process, even if there is no procedural irregularity so that if they deprive someone of life, liberty or property, they give rise to claim under due process clause", Gamble v. Eau Claire County, C.A.7 (Wis) 1993, 5 F.3d. 285.

"Administrative decision is "**arbitrary**" or "capricious", so as to violate this clause, when it is not supported by evidence or where there is no reasonable justification for the decision", Canty v. Board of Education, City of New York, D.C.N.Y. 1970, 312 F.Supp. 254. [This principle should also hold to judicial bodies].

The Kansas Supreme Court violated the procedural due process requirements of the Fourteenth Amendment to the U.S. Constitution when, in its majority opinion, it ignored the established Standard Rules of Statutory Construction, disregarded the clear and unambiguous language of K.S.A.60-206(b), and rendered an arbitrary finding, that partially voided the effect of Kansas Statute 60-206(b) in Read v. Miller, 247 Kan 557; 802 P.2d. 528, which is a precedent in this case. [Covers Question #2].

c). **Question #3**. Dismissal of petitioner's case by the Wyandotte County, Kansas State District Court was unlawful, as a misinterpretation of K.S.A.60-203 and a direct contradiction of the requirements of the Kansas Supreme Court.

Within Kansas Law, statutory limitation periods begin with the "Accrual of Cause of Action" and terminate with expiration of the prescribed period of time. The point in time where 'cause of action' accrues is a question of fact, and the Kansas Supreme Court has established that, unless readily determinable, if the fact of *when* 'cause of action' accrued is in good faith disputed, the question may not be resolved as a matter of law and it must be reserved for the trier of fact.

When the District Court found that the two-year statutory period had expired, of necessity, it implicitly made a finding of fact [misconstruing 'on or after' in the

petition to mean 'by this date'] regarding when that two-year period began, exceeding its authority, as expressly defined by the Kansas Supreme Court, and contrary to the requirements of due process.

"The Kansas provision... is essentially what has been identified as the 'Discovery Rule'. In judicially adopting the 'Discovery Rule' in Johnson v. Caldwell, 371 Mich 368, the Michigan Supreme Court... defines [it] in these terms: '...the limitation statutes in malpractice cases do not start to run until... the date when... plaintiff should have discovered the wrongful act...'." Continuing, "Summary judgment may be proper ...where there is no dispute or genuine issue as to the time when the statute began to run. But, where the evidence is in dispute... the issue is for determination by the trier of fact", Hecht v. First National Bank & Trust, 208 Kan 90; 490 P.2d. 649.

"...the evidence was in dispute as to when the 'fact of injury' first became reasonably ascertainable to plaintiff, and thus was an issue for determination by the trier of fact..", George v. W.G. Fertilizer Inc., 205 Kan 360; 469 P.2d. 459.

"We incline to the belief it was for the jury to determine... when plaintiff's disabling disease and its cause... was reasonably ascertainable", Miller v. Beech Aircraft Corp., 204 Kan 184; 460 P.2d. 535.

"Since the evidence is inconclusive, Jones must be afforded the right to have that issue determined by the trier of fact", Jones v. Neuroscience, 250 Kan 481; 827 P.2d. 51.

More importantly, the District Court erred when it dismissed petitioner's action based upon its finding that "no service of process was effected on any of the defendants within ninety (90) days *as required* by K.S.A.60-203", ORDER OF DISMISSAL. K.S.A.60-203 makes no such requirement. It merely establishes the date that action is technically 'commenced', so the Court's grounds for dismissal are wholly invalid.

It is an inescapable conclusion that the District Court denied petitioner's right to due process when it made findings in fact and law, in violation of the law.

d). **Question #4**. As described in petitioner/plaintiff's 'Motion for Extension and/or Enlargement', and as properly briefed before the Court of Appeals, on the last day of the original 90-day period for perfecting service of process, and according to pre-arrangements with the District Court, Charles Merritt, petitioner's rep-

resentative and a court appointed Special Process Server, arrived at the Clerk's office to receive process paper-work, but was denied receipt, until after the 90-day period had effectively expired.

This unnecessary obstacle created by the court was an undue burden, and effectively denied petitioner his last opportunity to perfect service of process within the initial 90-day period; and since the District Court ruled that this failure prohibits petitioner from accessing the legal system, then the court's obstruction constitutes a denial of due process.

The Kansas Court of Appeals, in Cochran v. Amrine, 130 P.2d. 606, appears to agree that when a litigant's efforts, to perfect legally required procedures within a prescribed period, are frustrated by obstructive action by government officials, 'due process' is denied. This is the only reasonable interpretation of the court's

'intercession' and mandate for a finding of fact on that question in the case.

"Whether any procedural protections are due depends not on whether governmental benefit is characterized as 'right'... but whether individual will be condemned to suffer grievous loss, and question is not merely weight of individual's interest but whether the nature of interest is one within the contemplation of 'liberty' or 'property' language of [the Fourteenth] Amendment", Morrissey v. Brewer, Iowa 1972, 92 S.Ct. 2593; 408 U.S. 471.

With denial of petitioner's action he did suffer a grievous loss, in the form of a serious physical injury coupled with the nullification of his right to legal claim; all due to a procedural 'triviality', which ignored the fact that petitioner clearly identified Charles Merritt to the court clerk as his representative (which should have permitted him to receive any papers on petitioner's behalf through 'agency' or 'personal authorization'); and which could have either been waived or deferred.

"The limit of the full control which the court has in the proceedings of its courts, ...is subject only to the qualification that such procedure must not work a denial

of fundamental rights", West v. Louisiana, La 1904, 24 S.Ct. 650; 194 U.S. 263.

If procedure is "...found to be... unjust, it may be declared to be not 'due process of law'", Davidson v. New Orleans, La., 96 U.S. 107.

"Requirements of due process are function not only of extent of governmental restriction imposed, but also of extent of necessity for restriction", Zemel v. Rusk, Conn. 1965, 85 S.Ct. 1271; 381 U.S. 1.

Surely, there could have been no legitimate, significant, incremental benefit to anyone, to refuse to allow petitioner's representative to receive process paperwork, and clearly the negative impact upon petitioner of this restriction was critically consequential.

e). **Question #5**. The failure of the District Court to even acknowledge petitioner's multiple appeals for procedural relief, 'Motion for Ex Parte Hearings or Two Week Continuance', 'Motion for Enlargement and/or Extension', 'Request for Additional Time'; and then to allow defendants to "*slip*" a new argument into the 'Order for Dismissal', which was not included in the

'Motion for Dismissal' that had been served on petitioner; without ever allowing petitioner an opportunity to respond before issuing immediate dismissal; certainly does not seem to characterize the sense of 'fair play' that justice is supposed to include. Some might even call it shocking to the sense of what is *right*.

"Denial of due process is failure to observe that fundamental fairness essential to the very concept of justice", Linden v. Dickson, C.A. Cal. 1961, 287 F.2d. 55.

"General test for identifying conduct that violates due process is to determine whether particular action shocks the conscience", Henderson v. Counts, D.C.Va 1982, 544 F.Supp. 149.

"While there is an interest in devising prompt and efficient procedures to achieve legitimate objectives, the Bill of Rights in general, and this clause in particular, are designed to protect fragile values of a vulnerable citizenry from overbearing concern for efficiency and efficacy", Cleveland Board of Education v. LaFluer, Ohio 1974, 94 S.Ct. 791; 414 U.S. 632.

"The Constitution recognizes higher values than speed and efficiency", Stanley v. Illinois, Ill 1972, 92 S.Ct. 1208, 405 U.S. 645.

"Due process is not an end in itself; Its Constitutional purpose is to protect substantive right to which individual has legitimate claim of entitlement", Rather v. Conte, Colo.App. 1992, 849 P.2d. 884.

f). **Question #6.** When the Kansas Court of Appeals affirmed the District Court's decision, it endorsed the same misconstruction and unlawful finding of fact discussed in 'c)', above, regarding the point in time that the statutory period of limitation began to run. This by itself constitutes sufficient denial of due process to warrant review and reversal.

g). **Question #7.** When petitioner was deprived of his right of action by the District Court's Order of Dismissal, and when he claimed that he had thus been deprived of his constitutional right to due process, he had a fundamental right to have that issue heard and determined. When the Kansas Court of Appeals decided that it did not have jurisdiction to decide the key issue in question it acknowledged that it did not have the authority to provide the necessary hearing.

Consequently, petitioner's issues were not 'heard', then or ever.

"Due process is accomplished by orderly proceeding... before a tribunal having jurisdiction... and with full power to grant relief", State ex rel. Oklahoma Employment Sec. Com'n v. Morrow, Okla. App.1994, 877 p.2d. 1182.

"It is essential to due process of law that there shall not only be notice of time and place for hearing, but what is more important, that there shall be a tribunal clothed with power by methods and rules prescribed by law to hear and determine the question involved", Central of Georgia R.R. Co. v. Macon, C.C.Ga. 1901, 110 F.865.

A meaningful hearing on petitioner's issues was never effectively convened.

"The right to petition the government for a redress of grievances includes the right of access to the courts; that right is also subject to due process protection in that the opportunity must be at a meaningful time and in a meaningful *manner*", Matter of N.C. Trading,1978, 586 F.2d. 221.

This principle has been embraced by the Kansas Supreme Court.

"...the appellant .. has a right to have the questions raised on this appeal determined", State, ex rel. v. Richardson, 174 Kan 382.

Nevertheless, upon issuance of the opinion of the Kansas Court of Appeals,

petitioner had **still**, in every meaningful sense, been denied "determination on his questions" and denied due process as guaranteed by the Fourteenth Amendment to the U.S. Constitution.

h). Question #8. K.S.A.60-513(c) had been ruled to be constitutional in a previous challenge in Stephens v. Snyder Clinic Ass'n, 230 Kan 115; 631 P.2d. 222, but as the Kansas Supreme Court pointed out in Farley v. Engelken, 241 Kan 672; 740 P.2d. 1058, the court in that earlier precedent..

"did not consider whether a '*heightened standard of review*' was appropriate."

In Farley, as well as in Kansas Malpractice Victims Coalition v. Bell, 243 Kan 333; 757 P2d. 251, the Kansas Supreme Court made it clear that the "heightened scrutiny" test was appropriate in constitutional tests on K.S.A.60-3403, 60-3407, 60-3409, and 60-3411 because it was the fundamental rights of access to 'due process' and

'equal protection' that would be compromised if those statutes were allowed to stand. Against this standard those statutes were ruled 'unconstitutional'.

Petitioner agrees with the court's rationale, and submits that it is an even more compelling argument when applied to K.S.A. 513(c), which poses an even greater threat to an injured party's fundamental rights to 'equal protection' and 'due process', in that it not only threatens to reduce potential awards, but can prohibit any remedy whatsoever; and that consequently, a new challenge to that statute, including consideration of whether a *'heightened standard of review'* should apply, is due, and would of necessity result in a reversal of Stephens v. Snyder Clinic Assn, 230 Kan 115; 631 P2d 222 and a similar finding of unconstitutionality for K.S.A. 60-513(c).

It is clear that the Kansas Supreme Court's holdings in these two cases (Farley & Coalition) are directly contradictory to its former holding in Stephens, in fact, observation of this inconsistency is included within the dissenting opinion in Farley v. Engelken; which suggests that Stephens is ripe for review. This contradiction was submitted to the Kansas Supreme Court in petitioner's request for review, but was ignored. So, the likelihood for any resolution is uncertain.

In support of the court's holdings in Farley and Coalition:

"Where certain fundamental rights are involved, regulation limiting these rights may be justified only by a compelling state interest and the legislative enactments must be narrowly drawn to express only legitimate state interests at stake", Roe v. Wade, Tex 1973, 93 S.Ct. 705; 410 U.S. 113.

"If state legislative enactment classifies commercial enterprises for purposes of regulation and that classification is neither premised upon suspect criteria nor infringes upon a 'fundamental right', presumption of constitutionality will attach", Hames Mobile Homes, Inc. v. Sellars, D.C. Iowa 1972, 343 F.Supp.12. **[This implies that the inverse is true, as well.]**

"If a statute does not impose a burden on or significantly interfere with a constitutional right, it need only be rationally related to a constitutionally permissible purpose to pass constitutional muster, but *if it does*, it must be narrowly drawn to a compelling state interest in order to pass that muster", Andrews v. Ballard, D.C.Tex. 1980, 498 F.Supp. 1038.

"... However when the liberty is 'fundamental', more stringent measure of substantive due process protection applies..", U.S. ex rel Hoss v. Cuyler, D.C.Pa. 1978, 452 F.Supp. 256.

The purview of the court ordinarily *precludes* subjective judgments regarding the wisdom or value of individual statutes, but when suspect classes are created (such as malpractice victims, in this case), or when fundamental rights are infringed upon (such as access to due process, right to trial and equal protection, in this case) 'balancing' judgments as to the compelling necessity and overriding benefit of the measure become paramount to the question of the constitutionality of the legislation.

Recognition, that alternate solutions to the medical malpractice insurance 'crisis'

are available, which can rationally and directly address the problem, makes it easier to see that K.S.A.60-3403, et seq., actually did not link to a State problem at all.

Rather than being narrowly drawn to address the STATE's problem with medical malpractice, this legislation was narrowly drawn to address and solve the concerns of the medical community, alone; sacrificing the interests of all other parties. The ONLY objective this legislation served was to make malpractice less painful for the medical community, in the erroneous suggestion that this somehow served the state, as a whole.

On the contrary, through the reduced risk of consequence, it likely would have made the medical community less concerned about acting responsibly so as to avoid malpractice liability. While malpractice awards and the number of cases may have decreased because of greater barriers to

due process, it would not have been because the problem had been solved for the state, or the public, but rather because a greater number of victims would have been denied full legal recourse.

The legislation, while making allusions to the state's interest, turned away from that interest and substituted the interests of the medical community as its direct objective. Narrowly drawn, there is no rational, direct link between the interests of the medical community and the State. They are actually, somewhat in conflict.

Thus, <u>within</u> the legislation there was no *'legitimate state interest'*, narrowly drawn to, as the true objective; and there was no rational link between the effect of the legislation and the state interest, referred to. Furthermore, as the true beneficiaries of this legislation can be seen to have been the medical community, it becomes clear that, in the unfair insulation of medical professionals from respon-

sibility for their actions, they would have been granted preferential status not granted to any other tort-feasor; and that malpractice victims would have been denied due process to a greater extent than any other tort victims. This makes it unmistakably clear that this legislation did indeed constitute a denial of 'equal protection' under the law, and indeed represented a manifest injustice.

The injustice was compounded by the fact that deception was being used to maneuver the public into accepting this solution.

"Another grossly inflated crisis is medical malpractice awards. Medical malpractice insurance amounts to less than 1% of U.S. health costs, and actual awards equal about three-tenths of one percent of the nation's total health bill. The claim that doctors are forced to practice 'defensive medicine' is also a canard. A study by the Office of Technology Assessment found that less than 8% of diagnostic procedures were performed even partly out of concern for malpractice liability", "Economic Viewpoint", Business Week p.22, March 20, 1995.

To illustrate how far removed from *'legitimate state interest'* this legisla-

tion was, consider what the hallmarks would be of legislation that genuinely addressed a state interest. First, it would not be 'one-sided', benefiting one party to the complete disadvantage of other parties; second, it would recognize that the **occurrence** of malpractice is the real problem, and it would attempt to solve the *cost* problem by reducing the *occurrence* problem. It would probably do this by attempting to more equitably allocate responsibilities and risks.

For example, a more equitable solution would include a requirement that medical practitioners compile data reflecting their performance in various high risk procedures, along with a requirement that full disclosures are made that would include 1) performance stats', as compared with industry averages; 2) patient complaints filed with the medical board; and 3) printed information, regarding the patient's diag-

nosed condition, complete with prognoses, under all treatment options.

It would put patients in a position to assume the majority of the risk, and tend to reward skillful practitioners, while weeding out dangerous physicians.

The point is, once we see that 'making malpractice less painful' for physicians is **not** of 'compelling state interest', the easier it is to see that the 'stricter standard of scrutiny' IS the correct standard to apply, to the statutes that were invalidated by the Kansas Supreme Court, and to K.S.A.60-513(c), as well.

Even if it is not so held under the U.S. Constitution, the Kansas 'equal protection clause' may be held to be more stringent. Either way, K.S.A.60-513(c) is equally subject to constitutional invalidation.

i). **Question #9.** K.S.A.60-2101(b) provides that:

"... any decision of the Court of Appeals shall be subject to review by the

Supreme Court... *as a matter of right*, whenever a question under the Constitution of either the United States or the State of Kansas arises for the first time as a result of such a decision.'

This condition was met, and the statutory right was claimed within the 'Petition for Review'; and was clarified in petitioner's 'Motion for Reconsideration', but it was wholly ignored by the Court. If this is not an outright denial of 'due process', what possibly could be?

Constitutional questions raised for the first time:

1). Based upon the decision in Read v. Miller, 247 Kan 557; 802 P.2d. 528, does the obvious lack of any reliance on a standard Rule of Statutory Construction [which addresses the determination of WHAT constitutes a 'conflict' between statutes] so easily allow for premature and inconsistent presumptions of 'conflict' in cases including that issue, that the public can have no reasonable expectation for 'fair

and consistent results', that 'equity in administration' is not provided for, and that procedural integrity is lacking; and does a case impacted by this 'lack' have a claim to deprivation of procedural due process, as guaranteed under Sections 5 and 18 of the Kansas Bill of Rights and the Fourteenth Amendment to the U.S. Constitution?

2). Does a State Supreme Court decision, which disregards the established Rules of Statutory Construction; disregards the clear and unambiguous language of a Statute; and then uses rationale, which can be shown to be arbitrary, to partially invalidate the legislated effect of a Statute; constitute a sufficient 'departure from the accepted and usual course of judicial proceedings' as to constitute a denial of due process, as guaranteed under Sections 5 and 18, Kansas Bill of Rights, and the Fourteenth Amendment to the U.S. Constitution?

3). Does the 'heightened standard of review' argument, raised as a new issue in Farley v. Engelken, 241 Kan 672, and Kansas Malpractice Victims Coalition v. Bell, 243 Kan 333, have application with regards to K.S.A.60-513(c); and in as much as this standard served to invalidate K.S.A.60-3403, 60-3407, 60-3409, and 60-3411, as unconstitutional, does it have the same effect with respect to K.S.A.60-513(c)?

In as much as all of these question are 'constitutional questions raised for the first time', it was unlawful as a direct violation of K.S.A.60-2101(b), and a denial of due process, for the Kansas Supreme Court to Deny petitioner's 'Petition for Review', which was guaranteed as a matter of statutory right.

j). **Question #10.** "...the appellant... has a right to have the questions raised on this appeal determined", State, ex rel. v. Richardson, 174 Kan 382.

In that case, has the Kansas Supreme Court not acknowledged a duty to ensure that relevant and substantiated questions raised by litigants receive proper attention, and receive meaningful answers; and if the Court ignores this duty is it not guilty of meaningfully violating its own definition of procedural due process?

K.S.A.20-3018(b) establishes that the criteria for granting review include

'(1) The general importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and a prior decision of the supreme court... (3) the need for exercising the supreme court's supervisory authority".

Granted, the ultimate discretion of the court is preserved, but the implication is that there is a presumption that the court will, in good faith, give due consideration to these criteria.

It should be clearly self-evident that all three of these criteria are very strongly met in the present case, and a question must be asked, "if the criteria

are overwhelmingly met and the court does not grant review, does that not indicate that the court has not lived up to the 'good faith presumption'; and that this then indicates a failure of the court in the performance of its duty and a substantive denial of procedural due process, as it should have, and would have otherwise occurred?

Aside from statutory law, the Kansas Supreme Court, and/or the Kansas Appellate Court System, has a constitutional duty, under the judicial, separation of powers and responsibilities provisions, to provide answers to relevant, substantiated, constitutional questions, properly raised, particularly when involving contradictions between its own rulings.

k). **Question #11**. Once the Kansas Court of Appeals declined to assess petitioner's arguments, that is, once the Kansas Court of Appeals declined to provide petitioner

with a meaningful hearing on his 'due process' issues, it became incumbent upon the Kansas Supreme Court to compensate for that omission. When the Kansas Supreme Court refused to do this, it reinforced and endorsed the denial of due process, which had accumulated to that point, becoming ultimately responsible for the denial of due process, itself.

"Refusal of judges to hear and decide a case with the result that the doors of the courts would be closed to the parties because there were no other judges qualified to hear the case could amount to a denial of due process", Atkins v. U.S., 1977, 556 F.2d. 1028.

"Right of access to courts is substantive, rather than procedural and its exercise can be shaped and guided by the state, but cannot be obstructed, regardless of procedural means applied", Morello v. James, C.A.2 (N.Y.) 1987, 810 F.2d. 344.

"The right to a fair and open hearing is assured to every litigant by this clause as a minimal requirement", Railroad Commission of Cal. v. Pacific Gas & Electric. Co., Cal 1938, 58 S.Ct. 334; 302 U.S. 388.

"Fundamental requirement of due process is opportunity to be heard at meaningful time and in meaningful *manner*", Matthews v. Eldridge, Va.1976, 96 S.Ct. 893; 424 U.S. 319.

The right of litigant to be *heard* is one of fundamental rights of due process of law", Council of Federated Organizations v. Mize, C.A.Miss.1964, 339 F.2d. 898.

"In general, due process requires that individual be given notice and opportunity to be heard before being deprived of property interest", Amstar Corp. v. M/V Alexandros T., D.C. Md 1977, 431 F.Supp. 328.

Petitioner's right to a fair hearing on the 'due process' issues, was absolutely denied, in direct violation of the Fourteenth Amendment to the U.S. Constitution.

l). **Question #12**. Basis is self-evident.

m). **Question #13**. "The right to sue and defend in the courts is the alternative of force, and it is one of the highest and most essential privileges of citizenship", Chambers v. Baltimore, etc., 28 S.Ct. 34.

Is it not true that the duty of the courts is to *administer* justice... that this does not mean, that the courts duty is merely to become satisfied within its own collective mind that its decisions are justified... that decisions are meant to be returned, for the benefit of the people. Only then, is justice served.

Is it not the public's **belief** in the availability of administered justice that

allows for civilized society to exist. In order for that belief to exist, mustn't the public feel some assurance that the judicial system does indeed provide for reasonable and equitable justice; and mustn't it feel secure that it may rely upon the consistency and continuity of rulings that come out of the judicial process.

This rationale supports the assertion that courts have a fundamental duty to communicate, to a meaningful extent, the rationale behind each decision, particularly decisions in law.

The Kansas Supreme Court violated this fundamental duty when it denied petitioner's Petition for Review, without providing any reason, explanation or justification, as to why.

n). **Conclusion**. "Due process of law is primary and indispensable foundation of individual freedom", Application of Gault, Ariz. 1967, 87 S.Ct. 1428; 387 U.S. 1.

"The due process clause "makes criminal the willful deprivation, under color of state authority, of any right... secured or

protected by the Constitution", Apodaca v. U.S., C.A.N.M., 188 F.2d. 932.

There has been such a widespread denial of due process in this case that 'manifest injustice' has been inflicted by the Kansas Judicial System. In spite of having a legitimate, substantiated and verifiable claim, properly presented, petitioner has been forced to work through the entire judicial system, with his questions and issues remaining ignored throughout.

The U.S. Supreme Court is the appropriate, and only remaining recourse in law.

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PRO SE PETITIONER/PLAINTIFF

APPENDIX "A"

LOWER COURT ORDERS AND OPINIONS

1. ORDER OF DISMISSAL OF ALL DEFENDANTS WITH PREJUDICE

Now on this 26th day of May, 1994, comes on for hearing Defendants' Motion to Dismiss; Defendants Board of Regents of the State of Kansas and University of Kansas Medical Center appear specially by attorney Reid Holbrook; and defendants Paul L. O'Boynik, M.D., David Schloesser, M.D., Martin E. Weinand, M.D., David G. Malone, M.D., Steven J. Hess, M.D., and Kansas University Surgery Association, appear specially by Larry L. McMullen and John Bukaty; all of the foregoing defendants denying the personal jurisdiction of this Court and all of said defendants appearing specially and for the limited purpose only of challenging the personal jurisdiction and service of process in this case; and not as a general appearance; and all of the

defendants specifically denying that they have been served or properly served with process so this Court has no personal jurisdiction over them; and plaintiff does not appear although the subject Motion and Suggestions in Support were properly served on plaintiff as certified to on May 13, 1994, and apparently received by plaintiff as shown by his untimely request for an extension of time to effect service of process; and this Court being fully advised in the premises does order as follows:

1. Plaintiff was properly advised and informed of the date for this hearing, and by communications to the Clerk of this Court, it appears that plaintiff was aware that this hearing would go forward as scheduled.

2. This cause was filed on February 7, 1994, and no service of process was effected on any of the defendants within ninety (90) days as required by K.S.A.60-

203 for the commencement of action; and plaintiff's request for an Extension of Time to effect service of process filed on May 16, 1994 was filed after said 90 days had expired, and therefore this Court denies said request under the authority of Read v. Miller, 802 P2 528 (Kan 1990), which holds that an extension of time under K.S.A.60-203 must be sought and granted before the expiration of the 90-day period.

3. In plaintiff's Petition it is pleaded that plaintiff first learned of defendants' negligence "on or after" February 15 or 16 (the date in the Petition being illegible), 1992, and therefore the two-year statute of limitations had run prior to the end of the 90-day period to effect service of process in this case.

For the above reasons this case is ordered dismissed, with prejudice, costs taxed against the plaintiff.

JUDGE BILL D. ROBINSON

APPROVED:

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2. KANSAS COURT OF APPEALS, MEMORANDUM OPINION #72,461.

Appeal from Wyandotte District Court; BILL D. ROBINSON, JR., judge. Opinion filed April 7, 1995. Affirmed.

David L. Burr, appellant pro se.

Reid F. Holbrook and *Brent G. Wright*, of Holbrook, Heaven & Fay, P.A., of Kansas City, *John J. Bukaty, Sr.*, of Kansas City, and *Larry McMullen* and *James R. Ward*, of

Blackwell, Sanders, Matheny, Weary & Lombardi, of Kansas City, Missouri, for the appellees.

Before PIERRON, P.J., LEWIS,J., and CAROL BACON, District Judge, assigned.

Per Curiam: This is a malpractice action in which plaintiff appears pro se. The action was dismissed by the trial court as timebarred. Plaintiff appeals. We affirm.

In this action, specific dates are of controlling importance. The petition alleges that plaintiff learned that his injuries were the result of defendants' negligence on or after February 15, 1992. The action was filed on February 7, 1994, which is within the period of the statute of limitations as established by K.S.A.60-513. However, plaintiff failed to accomplish service of process on any of the defendants.

On May 9, 1994, the period of 90 days from the filing of the petition expired.

On May 13, 1994, the defendants filed a motion to dismiss the action as timebarred. On May 16, 1994, plaintiff filed a "Motion and Request for Enlargement and/or Extension of the 90 Day Period for Timely Service of Process." Plaintiff's action was dissmissed by the trial court on May 26, 1994.

This was "an action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract." K.S.A.60-513(a)(7). It is controlled by a two-year statute of limitations. K.S.A.60-513(c) provides inpart that "the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such an action be commenced more than four years beyond the time of the act giving rise to the cause of action."

K.S.A.60-203(a) defines the commencement of action:

"A civil action is commenced at the time of: (1) Filing a petition with the clerk of the court, if service of process is obtained or the first publication is made for service by publication within 90 days after the petition is filed, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff; or (2) service of process or first publication, if service of process or first publication is not made within the time specified by provision (1)."

In this case, the statute of limitations would have expired on February 16, 1994, which is two years after plaintiff alleges that he learned that the fact of injury was due to the negligence of the defendants. In the event plaintiff failed to commence his action by this date, it would be barred by the statute of limitations. It is clear

from the record that service of process was not obtained within 90 days of the filing of the petition. It is further clear that plaintiff did not file a motion to extend the 90-day period until *after* the original 90-day period had expired.

Plaintiff did not obtain service of process on the defendants within 90 days after the petition was filed. For that reason, the civil action was not commenced and was time-barred.

Plaintiff counters by pointing out that he filed a motion to extend the 90-day period as required by K.S.A.60-203(a). Plaintiff's problem is that this motion was not filed until *after* the expiration of 90 days from the filing of the petition. Under those circumstances, the trial court had no authority to grant an extension of the original 90-day period. This issue is controlled by *Read v. Miller*, 247 Kan. 557, 802 P.2d 528 (1990) (adopting and quoting

verbatim *Read v. Miller*, 14 Kan. App. 2d 274, 788 P.2d 883 [1990]). In *Read*, both this court and the Supreme Court held that service of process must be obtained within 90 days after the petition is filed unless an extension is *sought and granted* prior to the expiration of the original 90-day period. 247 Kan. 557, Syl#2. Plaintiff did not request an extension of time to serve process upon defendants until the 90-day period had expired. Under the decision in *Read*, plaintiff's motion was filed too late to obtain an extension of the original 90-day period.

Plaintiff argues that *Read* was wrongfully decided and suggests that we overrule it. "This court is required to apply the law established by the decisions of our Supreme Court, absent some indication that the court is departing from its previously expressed position." *Zion Lutheran Church v. Kansas Comm'n on Civil Rights*, 16 Kan.

App.2d 237, 242, 821 P.2d 334 (1991), *aff'd* 251 Kan. 206, 830 P.2d 536 (1992). We see no indication that the Supreme Court would depart from the position announced in *Read*, and *Read* controls this action. Plaintiff's failure to file his motion prior to the expiration of the original 90-day period is fatal to this issue, and we affirm the trial court's decision that plaintiff's action was time-barred.

We note that plaintiff also argues that the trial court dismissed the action on a default basis because of his failure to appear at the hearing on the motion to dismiss.

The plaintiff is in error. The trial court did not render judgment against him for default, and the trial court's comments in the journal entry about plaintiff not "appearing" at the hearing simply indicates that plaintiff was not physically present.

Affirmed.

APPENDIX "B"

CONSTITUTIONAL PROVISIONS AND STATUTES (TEXT).

UNITED STATES CONSTITUTION, AMENDMENT 14.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CODE:

Title 28, Section 1257. "Final judgments or decrees rendered by the highest court of a State in which a decision could be had,

may be reviewed by the Supreme Court by Writ of Certiorari... where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution... of the United States... or where any... right... is... claimed under the Constitution... of... the United States."

KANSAS BILL OF RIGHTS:

Section 1. Equal Rights. All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.

Section 5. Trial by Jury. The right of trial by jury shall be inviolate.

Section 18. Justice without delay. All persons, for injuries suffered in person, reputation, or property, shall have remedy by due course of law, and justice administered without delay.

KANSAS SUPREME COURT RULES:

Rule 8.01. Transfer to supreme court on certification. Whenever the Court of Appeals shall request that an undetermined case pending before it be transferred to the Supreme Court for final determination, such request shall be by certificate of the Chief Judge of the Court of Appeals filed with the clerk of the appellate courts, accompanied by eight (8) copies. The certificate shall set forth the nature of the case, shall demonstrate that such case is within the jurisdiction of the Supreme Court, and shall show the existence of one or more of the grounds for transfer specified in K.S.A.20-3016(a). As may be appropriate, such certificate shall specify:

(a) Which issue or issues are not within the jurisdiction of the Court of Appeals with citation to controlling constitu-

tional, statutory or case authority;

(b) The subject matter of the case which has significant public interest; or

(c) The particular legal questions raised which have major public significance.

If the request is made under K.S.A.20-3016(a)(4), the certificate shall contain sufficient data concerning the state of the docket of the Court of Appeals and of the Supreme Court to demonstrate that the expeditious administration of justice requires such transfer.

K.S.A.20-3016(a). Request by court of appeals to transfer case to supreme court; certification of jurisdiction and findings; rules of supreme court; disposition of case by supreme court. (a) The court of appeals, prior to final determination of any case before it, may request that such case be transferred to the supreme court

for its review and final determination by certifying to the supreme court that the case is within the jurisdiction of the supreme court and that the court of appeals has made one (1) or more of the following findings with respect to such case: (1) One or more issues in such case are not within the jurisdiction of the court of appeals; (2) the subject matter of the case has significant public interest; (3) the case involves legal questions of major public significance; or (4) the caseload of the court of appeals is such that the expeditious administration of justice requires such transfer.

(b) Any certification of findings and request for transfer of a case pursuant to subsection (a) shall be made in the manner and form prescribed by rules of the supreme court. The supreme court shall consider such certification and may accept the case for review and final determination or may

decline jurisdiction and order that the case be determined by the court of appeals.

K.S.A.20-3018. Transfer of certain cases docketed in supreme court to court of appeals; transfer of cases docketed in wrong court; effect; motion for rehearing by court of appeals; petition for review of case by supreme court; rules of supreme court; authority of supreme court in granting or denying review; power of supreme court to order transfer of case from court of appeals to supreme court. (a) Any case within the jurisdiction of the court of appeals which is erroneously docketed in the supreme court shall be transferred by the supreme court to the court of appeals. Any case within the jurisdiction of the court of appeals and in which notice of appeal to the supreme court was filed prior to January 10, 1977, may be transferred to the court of appeals by the

supreme court. No case docketed either in the supreme court or in the court of appeals shall be dismissed solely for the reason of having been filed in the wrong court, but shall be transferred by the supreme court to the court which the supreme court determines to have jurisdiction. Any such case shall be considered timely and properly filed in the court to which it is transferred.

(b) Any party aggrieved by a decision of the court of appeals may file a motion with such court for a rehearing, in accordance with rules of the supreme court, but such motion shall not be a condition precedent to a review of such decision by the supreme court, and any such party may petition the supreme court for review within thirty (30) days after the date of such decision. The procedures governing petitions for review shall be prescribed by rules of the supreme court, and the review

of any such decision shall be at the discretion of the supreme court. While neither controlling nor fully measuring the court's discretion, the following shall be considered in determining whether review will be granted: (1) The general importance of the question presented; (2) the existence of a conflict between the decision sought to be reviewed and a prior decision of the supreme court, or of another panel of the court of appeals; (3) the need for exercising the supreme court's supervisory authority; and (4) the final or interlocutory character of the judgment, order or ruling sought to be reviewed.

(c) At any time on its own motion, the supreme court may order the court of appeals to transfer any case before the court of appeals to the supreme court for review and final determination.

K.S.A.60-203. Commencement of action. (a) A civil action is commenced at the time of: (1) Filing a petition with the clerk of the court, if service of process is obtained or the first publication is made for service by publication within 90 days after the petition is filed, except that the court may extend that time an additional 30 days upon a showing of good cause by the petitioner; or(2) service of process or first publication, if service of process or first publication is not made within the time specified by provision (1).

K.S.A.60-206 Time, computation and extension. The following provisions shall govern the computation and extension of time:

(b) Enlargement. When by this chapter or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the

judge for cause shown may at any time in the judge's discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but may not extend the time for taking any action under K.S.A.60-250 (b), 60-252 (b), 60-259 (b), (d) and (e) and 60-260 (b) except to the extent and under the conditions stated in them.

K.S.A.60-513 Actions limited to two years. (a) The following actions shall be brought within two (2) years: ...(7)An action arising out of the rendering of or failure to render professional services by a health care provider, not arising on contract.

(b) Except as provided in subsection (c) of this section, the cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall the period be extended more than ten (10) years beyond the time of the act giving rise to the cause of action.

(c) A cause of action arising out of the rendering of or the failure to render professional services by a health care provider shall be deemed to have accrued at the time of the occurrence of the act giving rise to the cause of action, unless the fact of injury is not reasonably ascertainable until some time after the

initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall such action be commenced more than four (4) years beyond the time of the act giving rise to the cause of action.

K.S.A.60-2101. Appellate jurisdiction of court of appeals and supreme court; appeal of order of political or taxing subdivision. (a) The court of appeals shall have jurisdiction to hear appeals from district courts, except in those cases reviewable by law in the district court and in those cases where a direct appeal to the supreme court is required by law. The court of appeals also shall have jurisdiction to hear appeals from administrative decisions where a statute specifically authorizes an appeal directly to the court of appeals from an administrative body or office. In

any case properly before it, the court of appeals shall have jurisdiction to correct, modify, vacate or reverse any act, order or judgment of a district court to assure that any such act, order or judgment is just, legal and free of abuse. Appeals from the district court to the court of appeals in criminal cases shall be subject to the provisions of K.S.A.22-3601 and 22-3602, and amendments thereto, and appeals from the district court to the court of appeals in civil actions, shall be subject to the provisions of K.S.A.60-2102, and amendments thereto.

(b) The supreme court shall have jurisdiction to correct, modify, vacate or reverse any act, order or judgment of a district court or court of appeals in order to assure that any such act, order or judgment is just, legal and free of abuse. An appeal from a final judgment of a district court in any civil action in which a

statute of this state or of the United States has been held unconstitutional shall be taken directly to the supreme court. Direct appeals from the district court to the supreme court in criminal cases shall be as prescribed by K.S.A.22-3601 and 22-3602, and amendments thereto. Cases appealed to the court of appeals may be transferred to the supreme court as provided in K.S.A.20-3016 and 20-3017, and amendments thereto, and any decision of the court of appeals shall be subject to review by the supreme court as provided in subsection (b) of K.S.A.20-3018, and amendments thereto, except that any party may appeal from a final decision of the court of appeals to the supreme court, as a matter of right, whenever a question under the constitution of either the United States or the state of Kansas arises for the first time as a result of such decision. [subsections (c) & (d), not relevant].

K.S.A.60-3403. Repealed 1988. (a) In any medical malpractice liability action, evidence of the amount of reimbursement or indemnification paid or to be paid to or for the benefit of a claimant under the following shall be admissible: (1) Medical, disability or other insurance coverage except life insurance coverage; or (2) workers' compensation, military service benefit plan, employment wage continuation plan or program provided by law.

(b) When evidence of reimbursement or indemnification of a claimant is admitted pursuant to subsection (a), the claimant may present evidence of any amounts paid to secure the right to such reimbursement or indemnification and the extent to which the right to recovery is subject to a lien or subrogation right.

(c) In determining damages in a medical malpractice action, the trier of fact shall

consider: (1) The extent to which damages awarded will duplicate reimbursement or indemnification specified in subsection (a); and (2) the extent to which such reimbursement or indemnification is offset by amounts or rights specified in subsection (b).

(d) The provisions of this section shall apply to any action pending or brought on or after July 1, 1985, regardless of when the cause of action accrued.

K.S.A.60-3407. Limitations on compensatory damages. (a) In any medical malpractice liability action:

(1) The total amount recoverable by each party from all defendants for all claims for noneconomic loss based on causes of action accruing before July 1, 1988, shall not exceed a sum total of $250,000; and

(2) subject to K.S.A.60-3411, the total amount recoverable by each party from all

defendants for all claims shall not exceed a sum total of $1,000,000.

(b) If a medical malpractice liability action is tried to a jury, the court shall not instruct the jury on the limitations imposed by this section or on the ability of the claimant to obtain supplemental benefits under K.S.A.60-3411.

(c) In a medical malpractice liability action, subject to apportionment of fault pursuant to K.S.A.60-258a and amendments thereto:

(1) If the verdict results in an award for noneconomic loss which exceeds $250,000, the court shall enter judgment for $250,000 for all the party's claims for noneconomic loss.

(2) If the verdict results in an award for current economic loss which exceeds the difference between $1,000,000 and the amount awarded by the court for damages for noneconomic loss, the court shall enter

judgment for an amount equal to such difference for all the party's claims for current economic loss.

(3) If the sum of the amounts awarded by the court for noneconomic loss and for current economic loss is $1,000,000 or more, no judgment shall be entered for future economic loss. If the sum of such amounts is less than $1,000,000 and the verdict results in an award for future economic loss which exceeds the difference between $1,000,000 and the sum of such amounts, the court shall enter judgment for the cost of an annuity contract which, to the greatest extent possible, will provide for the payment of benefits over the period of time specified in the verdict in the amount awarded by the verdict for future economic loss, the cost of such annuity not to exceed the difference between $1,000,000 and the sum of the amounts awarded by the

court for noneconomic loss and current economic loss.

(d) The limitations on the amount of damages recoverable for noneconomic loss under this section shall be adjusted annually on July 1 by rule of the supreme court in proportion to the net change in the United States city average consumer price index for all urban consumers during the preceding 12 months.

(e) The provisions of this section shall not be construed to repeal or modify the limitation provided by K.S.A.60-1903 and amendments thereto in wrongful death actions.

(f) the provisions of this section shall expire on July 1, 1993.

K.S.A.60-3409. Repealed 1988. (a) In any medical malpractice action in which the verdict awards damages for future economic loss, the verdict shall not reduce such

damages to their present value and the jury shall be instructed to that effect. The court shall reduce such damages to their present value and, except as provided by K.S.A.60-3407, the court shall enter judgment, with respect to such damages, for an annuity contract which, to the greatest extent possible, will provide for the payment of benefits over the period of time specified in the verdict in the amount awarded by the verdict for future economic loss. The judgment shall incorporate the intervals of the annuity payments, which shall be fixed and determinable as to amounts and dates of payments.

(b) The health care stabilization fund or insurer shall purchase the annuity provided for in K.S.A.60-3407 or this section upon approval of the court and, upon payment by the fund or insurer of the cost of such annuity, the judgment will be satisfied as to such annuity.

(c) If an annuity is purchased pursuant to K.S.A.60-3407 or this section, the annuitant shall not own, receive by assignment or otherwise have any interest in the ownership or purchase of the annuity and periodic payments made through such annuity shall not be accelerated, deferred, increased or decreased by the annuitant. If the fund or insurer assigns the annuity, the assignee shall not provide to the annuitant rights against the assignee which are greater than those of a general creditor and the assignee's obligation shall be no greater than the obligation of the assignor.

(d) Benefits paid under an annuity contract awarded pursuant to this section or K.S.A.60-3407 shall not be assignable or subject to levy, execution, attachment, garnishment or any other remedy or procedure for the recovery or collection of a debt, and this exemption cannot be waived.

K.S.A.60-3411. Repealed 1988. (a) As used in this section, "medical malpractice liability action" and "medical care and related benefits" have the meanings provided by K.S.A.60-3401 and K.S.A.60-3406, respectively.

(b) If a claimant in a medical malpractice liability action has recovered, pursuant to a judgment or settlement agreement which has been itemized to show the amounts settled upon for noneconomic loss, current economic loss, future economic loss and future medical and related benefits, the maximum amount allowable under K.S.A.60-3407 and the amount so recovered is insufficient to pay for necessary medical care and related benefits, the claimant may petition the court which heard the original action or, in the case of a settlement, the court which originally would have had venue, for supplemental benefits to pay for

future medical care and related benefits. Any award for supplemental benefits shall be paid from the health care stabilization fund.

(c) Before awarding supplemental benefits, the court shall make a finding that all amounts recovered for medical care and related benefits pursuant to the settlement agreement or judgment have been actually used to pay for medical care and related benefits and that such amounts are insufficient to pay for future medical care and related benefits.

(d) In reaching its decision on whether to grant supplemental benefits, the judge shall consider: (1) The needs of the claimant; and (2) the availability of payments from collateral sources or governmental benefits to the claimant.

(e) In no event shall the supplementary grant, when added to the amount previously received by the claimant, exceed the least

of: (1) The amount specified in the jury verdict for medical care and related benefits; (2) the amount actually necessary to pay for medical care and related benefits; or (3) $3,000,000.

(f) Any grant pursuant to this section may be in the form of an annuity contract.

APPENDIX "C"

Footnote Case Support

Footnote 1: Reasons for granting petition are supported by:

Craig v. Carson, 449 F.Supp. 385; Rainbow Val. Citrus Corp. v. Federal Crop Ins. Corp., Ar.2 1974, 506 F.2d 467; United Mine Workers of America, Dist 12, v. Illinois State Bar Ass'n., Ill 1967, 88 S.Ct. 353; 389 U.S. 217; Rice v. Sioux City Memorial Park Cemetery, Iowa 1955, 75 S.Ct. 614, 349 U.S. 70; Yellin v. U.S., Ind 1963, 83 S.Ct. 1828; 374 U.S. 109; Re Murchison, Mich. 1955, 75 S.Ct. 623; 349 U.S. 133.

Footnote 2: Additional support for statutory construction argument in issue #1, against Read v. Miller decision.

See also Allen v. Grand Cent. Aircraft Co., 74 S.Ct. 745; 347 U.S. 535; Sanford v. Commissioner of Internal Revenue, 60 S.Ct.

51 (1939); 308 U.S. 39; United States v. Fixico, 115 F.2d. 389 (1940); Maiatico v. United States, 302 F.2d. 880 (App.D.C. 1962); International Union of Electrical, Radio, and Machine Workers, AFL-CIO, v. National Labor Relations Board, 289 F.2d. 757 (1960); Graham v. Tallent, 235 Ga 47; 218 SE2d 799 (1975); Commonwealth v. Bates, 235 Ky 763; 32 SW.2d. 334 (1930).